United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-7550, 7607, 7617

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

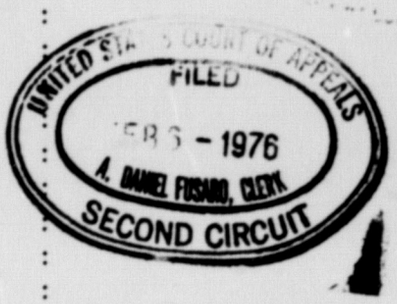
REX-NORECO, INC.,

Plaintiff-Appellee-
Appellant

v.

ISIDORE GOODSTEIN, PARKSVILLE MOBILE MODULAR HOMES, INC., and ADAM FILIPOWSKI,

Defendants-Appellants
- Appellees.



REPLY BRIEF FOR PLAINTIFF
- APPELLEE - APPELLANT

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RESTATEMENT OF ISSUES

A reading of the joint Brief of the defendants together with the Brief initially submitted by plaintiff establishes that three issues are presented for decision by this Court:

1. Whether the decision of the Court below, denying plaintiff recovery of $15,041 in pension and profit sharing benefits paid to the account of defendant Goodstein on the ground that the "forfeiture" provisions of the plans are unenforceable liquidated damage clauses, was correct?

2. Whether the decision of the Court below holding defendants in contempt of Court by reason of their disregard of the Court's preliminary injunction should be reversed because permanent injunctive relief was ultimately denied to plaintiff?

3. Whether the award by the Court below of specific monetary damages to plaintiff should be reversed because the Amended Complaint did not specifically allege the precise items of damage which were ultimately awarded?

I

THE DECISION OF THE COURT BELOW DENYING PLAINTIFF RECOVERY WITH RESPECT TO PENSION AND PROFIT SHARING PLAN PAYMENTS WAS BASED SOLELY ON A PROPOSITION OF LAW WHICH WAS INCORRECTLY APPLIED TO THE PLAN PROVISIONS AT ISSUE

The reasons why this Court should reverse the decision of the Court below denying plaintiff recovery of the pension and profit sharing plan payments made to defendant Goodstein's account are set forth in full in the main Brief initially filed by plaintiff. Accordingly, it seems appropriate at this juncture to confine comment to particular statements made in defendant Goodstein's Brief with respect to that issue.

A comparison of the statement of the issue presented for review contained in plaintiff's original Brief (p. 1) with the statement contained in Goodstein's Brief (p. 1) shows that disposition of the issue on appeal necessarily turns on a definition of the issue in the first place. Plaintiff does not contend that the "forfeiture" clause was intended as a good faith effort to estimate actual damages which might flow from the conduct of any employee that might trigger its operation. By the same token, plaintiff does not contend that there must be any reasonable relationship between the amount of pension and profit sharing

rights that might be forfeited and the magnitude of economic harm caused by the triggering conduct.

Courts have long been confronted with the sad prospect of a long term member of a government agency (such as the Postal Department, the Police Department or the Internal Revenue Service) who is dismissed for breaches of trust and thus loses substantial pension rights (such as thefts of stamps by a postal employee or the acceptance of small bribes by police or Internal Revenue Service agents). Yet, Goodstein would have this Court believe that a police officer with many years of service who daily during the course of a year accepts $5.00 bribes to refrain from handing out traffic tickets and who is dismissed from the police force as a consequence should still be entitled to collect very substantial pension benefits, subtracting therefrom only the modest amounts received as bribes or possibly the amounts of the fines that would have been levied on the offenders had the traffic tickets been issued. The same kind of analysis can easily be developed for an Internal Revenue Service Agent who is found to have accepted several small bribes or a postal employee who has gone home with sheets of stamps for use by himself and his neighbors.

These illustrations tellingly demonstrate that Goodstein's position shows as little regard for the importance of fiduciary principles as was evidenced by his behavior during the last six months of employment by plaintiff. More importantly, Goodstein's position assumes that the "forfeiture" provisions in plaintiff's plans - which were commonly found in pension and profit sharing plans prior to recent Internal Revenue Code amendments - cannot validly have prophylactic objectives. That assumption is plainly inconsistent with the realities that have existed at least prior to recent Code amendments.

Apparently, Goodstein's position is based on the erroneous assumption that the Court below found that he "did not violate his fiduciary duties in any way" (Goodstein Brief p. 26). However, that assumption and that statement in Goodstein's Brief misconceives and misrepresents the Findings of the Court below. As indicated in plaintiff's main Brief, the Court below expressly concluded, as a matter of law, that Goodstein "breached . . . his fiduciary duty to Rex in that, for the last five months of his employment he took steps to organize a competing business and improperly charged to Rex a portion of the cost of organizing such business, without any disclosure to any official of Rex" (App. 415). Nowhere in the later opinion of the Court

below on May 14, 1975 is there a finding that Goodstein did not violate his fiduciary duties. Thus, a complete reading of all of the opinions of the Court below, including its opinion of May 14, 1975, clearly shows that Goodstein had been guilty of "disloyalty" - to use the word found in the May 14 opinion (App. 490) - and that Rex would never have made voluntary payments to Goodstein at the time his employment terminated had it "known of Goodstein's disloyalty" (App. 490).

In view of the findings of the Court below that Goodstein breached his fiduciary duties as an officer of Rex, Goodstein's argument that the "forfeiture" provisions should not apply because (i) he resigned before his "disloyalty" was discovered and (ii) his conduct did not fall within the specific categories of improper conduct referred to in the provisions, ignores both the language of the provisions and the principle that there should be a rational purpose to the law and to the resolution of legal disputes. In the first place, the specific references to "proven dishonesty", etc., in the "forfeiture" clauses are only illustrations of "cause" for discharge and do not purport to be all inclusive. Certainly, ordinary principles of construction would support the position which the Court below implicitly took that violation of fiduciary duties would be "cause" for discharge

within the meaning of those provisions. In any event, contrary to Goodstein's assertions, the Court below did not find that Goodstein had not engaged as a principal in a competitive business. All that the Court found in denying a permanent injunction was that Goodstein's competitive activities did not cause irreparable damage to plaintiff justifying permanent injunctive relief or supporting an award for compensatory damages in excess of the damages actually awarded. In short, the Court below found that one of the conditions of the "forfeiture" clauses -- that Goodstein had engaged as a principal of a competitive business -- had been met.

The only other contentions made by Goodstein with reference to this issue are based on the misleading statement that plaintiff "was required to make certain contributions to Goodstein 'which became vested'". (Goodstein Brief p. 5). The fact of the matter is that plaintiff was never required to make pension and profit sharing plan contributions of any fixed amounts and such contributions as were made were not made to Goodstein or to any other particular employee, but were made in a lump sum in respect of all employees. Each employee's share of any funds deposited under the plans would depend on the vicissitudes of the investments made with those funds as well as satisfaction of all the conditions

for receipt of distributions contained in the plans. Nowhere can Goodstein point to any provision of the plans or any other evidence establishing that specific payments were made to him or set aside for him under the plans.

As far as Goodstein's reference to the Internal Revenue Code is concerned (Goodstein Brief p. 6), suffice it to say that the recent amendments of the Code barring effectiveness of "forfeiture" provisions for plans effective after various dates in 1975, demonstrate that such "forfeiture" provisions were permissible and enforceable prior to the applicability of the recent amendments. If this were not so there would have been no need for the amendments nor would there have been any need to postpone effectiveness of the relevant amendments for a substantial period after the date those amendments were adopted.

In the last analysis, the only conceivable ground upon which the decision of the Court below denying plaintiff recovery of the pension and profit sharing distributions could be upheld is the ground upon which the Court rested that decision. For the reasons stated in plaintiff's main Brief, that decision so based should be reversed.

II

THE DEFENDANTS CANNOT ESCAP[illegible]ESPONSIBILITY FOR THEIR ARROGANT CONTEMPT OF THE INJUNCTION OF THE COURT BELOW BECAUSE PERMANENT INJUNCTIVE RELIEF WAS ULTIMATELY DENIED

It is axiomatic that a preliminary injunction must be obeyed until it is properly set aside and that it is no defense to punishment for contempt that the contemptuous party ultimately prevails in the litigation. See, e.g., United States v. United Mine Workers of America, 330 U.S. 258, 289-95 (1947); Leighton v. Paramount Pictures Corporation, 340 F.2d 859 (2d Cir. 1965). This proposition seems to dispose of the defendants' argument that the Orders of the Court below holding them in contempt for disobeying the preliminary injunction should be reversed.

To the extent that defendants may seem to argue that the decisions holding them in contempt should be reversed because they were not in fact in contempt, they cannot prevail in the face of the overwhelming evidence which is before this Court. Numerous exhibits in the Joint Appendix as well as admissions found in the defendants' Brief in this Court, show that defendant Parksville continued selling mobile homes in violation of the preliminary injunction from May 20, 1974 the date the injunction became effective, until the end of

November 1974 (App. 106-122; 132-163; 400-402; 445-449; Defendants' Brief p. 39).* Moreover, defendants Goodstein and Filipowski cannot carry their burden of showing that the Court below erred in attributing Parksville's contemptuous conduct to them. FRCP Rule 52(a); Clements Auto Co. v. Service Bureau Corp., 444 F.2d 169 (8th Cir. 1971); Collins v. Wilson, 40 A.D. 2d 750, 337 N.Y.S. 2d 541 (4th Dept. 1972). It is obvious that the second contempt determination of the Court below (which is found in its opinion of April 14, 1975 (App. 453)) was based upon the evidence of the behavior of all defendants which had been developed during the lengthy trial. Since the defendants have the burden of showing that the trial court's decision cannot be supported by evidence adduced at trial, they cannot obtain a reversal of the contempt determination in the absence of a Transcript.

* Defendants' argument seems to be based on the misconception that the Court below only enjoined "competitive" sales and that it found Parksville did not engage in "competitive" sales (Def. Brief, pp. 36 and 38). This argument ignores the clear and unambiguous finding by the Court below that, as to used units which were no more than three years old the businesses were competitive (App. 414; Findings 32-35; App. 451). Contrary to defendants' assertion, the Court below did not find that plaintiff had only three competitive units (not more than three years old) for sale during the relevant period; it found that only three of approximately twenty competitive units offered by plaintiff were unsold and thus plaintiff had not proved any loss of sales due to defendants' competitive operation (App. 452).

Inasmuch as plaintiff was required to bring the defendants' disregard of the Court's Order to the attention of the Court below, it was completely proper for the Court, in its discretion, to award plaintiff reasonable attorneys' fees as damages for defendants' contempts.

III

THE FACT THAT PARTICULAR ELEMENTS OF DAMAGE ARE NOT ALLEGED WITH SPECIFICITY IN A COMPLAINT DOES NOT PRECLUDE THEIR RECOVERY, PARTICULARLY WHERE OBJECTION TO RECOVERY ON SUCH BASIS IS NOT MADE IN THE TRIAL COURT

Defendant Goodstein's sole argument for reversal of the award of certain items of damage is that those items of damage are not alleged with specificity in the Amended Complaint. Such an argument flies in the face of two well-established principles. First, it would have this Court reject the fundamental principle underlying the Federal Rules of Civil Procedure, that the disposition of disputes should not turn on pleading technicalities. Moreover, in the Court below Goodstein never made the argument he is here asserting. Cf., Fortunato v. Ford Motor Co., 464 F.2d 962 (2d Cir. 1972). Presumably, he did not make the argument in the Court below because it was contradicted by the realities with which Judge Lasker

was very familiar - i.e., that plaintiff had stated in depositions and at trial on numerous occasions its intention to seek recovery for the unauthorized telephone calls, for the severance pay and for the relocation expenses paid to Goodstein before realization of his disloyalty and wrongful conduct.

Thus, if specific reference in the complaint to the damages awarded had been required, a motion to amend the complaint after trial to conform the pleadings to the evidence would have been made and granted. Cf. FRCP 15(b); Bucky v. Sebo, 208 F.2d 304 (2d Cir. 1954); Saper v. Hague, 186 F.2d 592 (2d Cir. 1951); Iodice v. Calabrese, 345 F. Supp. 248, (S.D.N.Y. 1972), aff'd in part and rev'd in part, 512 F.2d 383 (2d Cir. 1975).

CONCLUSION

For the foregoing reasons, and for the reasons advanced in plaintiff's main Brief, (i) the decision of the Court below denying plaintiff recovery of the pension and profit sharing payments made to Goodstein should be reversed with a direction to enter judgment for such amount for plaintiff, and (ii) the decisions of the Court below finding defendants

in contempt and awarding plaintiff damages and attorneys' fees for such contempt plus compensatory damages in the aggregate amount of $3,816.02, plus interest should be affirmed.

Respectfully submitted,

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Plaintiff-Appellee-Appellant

Of counsel:
Jeffrey A. Fillman, Esq.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

CHARLOTTE J. HARRISON, being duly sworn, deposes and says:

I am not a party to the action, am over 18 years of age and reside at 89-19 171 Street, Jamaica, New York, 11432.

I served a true copy of the annexed Reply Brief for Plaintiff-Appellee-Appellant in the following manner:

By mailing the same in a sealed envelope, with postage prepaid thereon, in a post-office or official depository of the U.S. Postal Service within the State of New York, addressed to the last known address of the addressees as indicated below:

Mark E. Arroll, Esq.
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Charlotte J. Harrison
CHARLOTTE J. HARRISON

Sworn to before me this
6th day of February, 1976.

Theresa M. Florio
Notary Public

THERESA M. FLORIO
NOTARY PUBLIC, State of New York
No. 24-6339650
Qualified in Kings County
Commission Expires March 30, 1976